FLSA-716

October 7, l986

This is in further response to your letter of March l7, addressed to our Denver Area Office, concerning the application of the overtime pay provisions of the Fair Labor Standards Act (FLSA) to the *** Ski Resort *** . You ask whether a seasonal recreational business is required to pay overtime pay under FLSA. We regret the delay in responding to your inquiry.

You state that *** operates ski runs and lifts and provides ski instruction, lodging, and food services for skiers. It also provides related services such as ski equipment sales, rentals, and repairs. We understand that *** base facilities are on private land within the boundaries of the Roosevelt National Forest and that *** has been granted permission to use Roosevelt National Forest land for some of the ski runs and lifts it operates under a term special use permit issued by the Forest Service, U.S. Department of Agriculture.

The FLSA is the Federal law of most general application concerning wages and hours of work. It requires that all covered and nonexempt employees be paid not less than the minimum wage of $3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section l3(a)(3)of FLSA provides a minimum wage and overtime pay exemption for any employee employed by an amusement or recreational establishment if (A)it does not operate for more than 7 months in any calendar year, or (B) during the preceding calendar year its average receipts for any 6 months of such year were not more than 33 l/3 percent of its average receipts for the other 6 months of such year. In order to meet the test in (B), the establishment in the previous year must have received at least 75 percent of its income within 6 months. However, the 6 months need not be consecutive.

Sections l3(a)(3) and l3(b)(29) further provide, however, that any employee of an amusement or recreational establishment that is a private entity engaged in providing services and facilities directly related to skiing in a national park or a national forest under a contract with the Secretary of the Interior or the Secretary of Agriculture must receive compensation for overtime worked in excess of 56 hours at a rate not less than one and one-half times the regular rate at which the employee is employed. A term special use permit issued by the Forest Service is considered to be a contract within the meaning of sections l3(a)(3) and l3(b)(29) of FLSA.

In short, if *** meets one of the alternative seasonality tests in section l3(a)(3), it is exempt from the minimum wage provisions but must pay overtime after 56 hours worked in a workweek. If the ski operation does not meet either of the seasonality tests described above, it is not entitled to any exemption and, therefore, must pay its employees at least $3.35 an hour as well as overtime after 40 hours worked in the workweek.

It is our position that employees of an amusement or recreational establishment who, in addition to their maintenance and repair work, engage in construction activities such as erecting new structures or buildings, or remodeling or expanding existing facilities, are not within the exemptions described in any workweek in which such construction work is performed. Brennan v. Six Flags Over Georgia, LTD., 20 WH Cases ll65 (5th Cir. l973).

We also wish to point out that, regardless of the application of FLSA, laborers or mechanics employed by a contractor or subcontractor on contracts with the Federal government which are subject to the Contract Work Hours and Safety Standards Act (copy enclosed) would have to be paid at least time and one-half their regular rates of pay for hours worked in excess of 40 in a workweek.

We trust that the above is responsive to your inquiry. Please let us know if we may be of further assistance.

Sincerely,

Paula V. Smith
Administrator

Enclosures